IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00865 COA

CARL DOSS WARE **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	12/09/94
TRIAL JUDGE:	HON. JOHN B. TONEY
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RICHARD FLOOD
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFERY A. KLINGFUSS
DISTRICT ATTORNEY:	JOHN KITCHENS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CAPITAL MURDER: SENTENCED TO SERVE A TERM OF LIFE WITHOUT ELIGIBILITY FOR PAROLE
DISPOSITION:	AFFIRMED - 12/02/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Carl Doss Ware was convicted of capital murder in the Madison County Circuit Court and sentenced to life imprisonment without the possibility of parole. Ware appeals his conviction, alleging that the trial court erred in the following respects: (1) overruling his motion to sequester the State's witness Carroll Phelps; (2) denying his request to voir dire the jury concerning a potential sentence of life without possibility of parole; (3) allowing his confession to be admitted into evidence despite his motion to suppress; (4) denying his motion to suppress DNA testimony and related exhibits; (5) overruling his objection to the admission of footprint testimony and related exhibits; (6) admitting

certain autopsy testimony and photographs into evidence over his objection; (7) allowing the out-of-court identifications by witnesses based on a tainted photo lineup; and (8) granting the State's aggravating circumstances jury instructions. Finding no merit to these arguments, we affirm.

FACTS

On November 12, 1992, Amy Lynn Lackett was found dead in her home, beaten to death with a baseball bat. Two witnesses placed Ware within one-half mile of Lackett's house. Ware had been arrested for burglarizing the same home two years prior to the murder. Ware was arrested for murder on November 13 and made two separate statements, one on November 16 and the other on November 17. Both statements were preceded by a waiver of rights signed by Ware. The substance of these statements varies greatly. In the first statement, Ware gives a long rambling rendition of his travels on November 12, basically denying he was at Lackett's house. In Ware's second statement, he gives a strikingly different account of the events of November 12, 1992. Ware admits breaking into the home, having sex with Lackett, and beating her with the bat. Also, Ware claims through his November 17 statement that he and Lackett had been "seeing each other" for almost one year, and she feared that she was pregnant. Ware claims that based on her fear that she was pregnant, Lackett begged him to beat her with the bat. So he did.

On May 26, 1993, Ware was indicted for the capital murder of Lackett. The trial began on December 5, 1994. The jury was empaneled and sequestered that same day. The trial lasted for five days. The jury returned a verdict of guilty of capital murder and after a separate hearing, sentenced Ware to serve life imprisonment without the possibility of parole. Ware filed a motion for new trial which was denied by the trial court.

DISCUSSION

1. Sequestration of Chief Investigator

Ware argues that it was improper for Carroll Phelps, the chief investigating officer for the State, to sit at the State's table because he also testified at trial. The exclusion of witnesses is a party's right, except for a witness in one of the three categories established in the rule. **M.R.E. 615; *Russell v. State*, 607 So.2d 1107 (Miss. 1992).** Those categories are these: "(1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause." **M.R.E. 615.** Phelps was designated by the State as its representative. The State argued that as the chief investigating officer in the case, Phelps was needed in the courtroom to assist the prosecution at trial.

Ware argues that the State failed to make a showing that Phelps was essential to the presentation of the case. There is no reason under the rule, its accompanying comment, or any case law that we have discovered that an investigative agent may not be designated to sit as the government's representative at its counsel table. Indeed, it is a logical designation, as the purpose of the designation is to have someone knowledgeable about the case to assist counsel. We find no error.

2. Voir Dire

Ware argues that the trial court erred in denying his request to voir dire the jury concerning a potential sentence of life without the possibility of parole. There is no documentation in the record that this request was made. Therefore there is nothing on this issue for us to review.

3. Motion to Suppress Confessions

Ware's next assignment of error is that the trial court erred when it denied his motion to suppress the statements that he made in police custody on November 16 and 17, 1992. The motion to suppress focused on Ware's low intelligence and that an earlier statement (November 13) had been acquired without the giving of *Miranda* warnings. After conducting a lengthy suppression hearing, the trial court overruled the motion and allowed the statements into evidence. The trial court made specific findings. With regard to the statement made on November 16, the court found "that the Defendant made a knowing, intelligent waiver of his right to counsel; that based on the testimony [the court] heard, the statement was taken properly; there was no coercion; there was no duress; there were no promises of favors or hopes of reward. The statement was freely and voluntarily given, and it will not be suppressed." The same was found for the statement made on November 17.

The determination of admissibility of a confession is essentially a fact finding function. ***Lesley v. State*, 606 So.2d 1084, 1091 (Miss. 1992).** We will not overturn findings of fact made by the trial judge unless they are clearly erroneous. ***Id.*** Judge Toney complied with the appropriate legal standard for determining whether Ware's statement was knowing, intelligently, and voluntarily given. The court conducted a full hearing and made specific findings. Based on the record before us, we do not find that the decision rendered by the trial court was clearly erroneous.

4. DNA Testimony

Ware claims the trial court erred when it denied his motion to suppress the admission of DNA testimony and related exhibits that he considered unreliable. The trial court conducted a hearing and based on the testimony ruled that the evidence met the relevant test adopted by the supreme court and was competent and admissible. The test is this:

> I. Is there a theory, generally accepted in the scientific community, that supports the conclusion that DNA forensic testing can produce reliable results?
>
> II. Are there current techniques that are capable of producing reliable results in DNA identification and that are generally accepted in the scientific community?
>
> III. In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests?

***Polk v. State*, 612 So.2d 381, 390 (Miss. 1992)**(adopting test of ***Ex parte Perry v. State*, 586 So.2d 242, 250 (Ala.1991))**. In *Polk*, the court examined the first two factors and determined that DNA testing meets those standards. Thus we only need to determine whether this specific DNA evidence was acceptable under the third component of the test.

A blood sample was taken from both the victim and Ware. Dried seminal fluid samples were used

that were found on the blanket upon which the victim was lying, as well as from vaginal and anal swabs taken from the victim. Extensive testing was performed on the samples, and the results were compared. Dr. Deadman described the steps the FBI technician used in the testing of DNA. He also in great detail described the procedure by which DNA profiles are produced. Dr. Deadman explained how the FBI concluded that there was a match between Ware's DNA and the DNA extracted from the seminal fluid samples. He testified that the FBI's protocol included specific quality control measures directed at proper labeling and handling of all specimens to prevent any substitution of samples or of cross- contamination. He also said that the testing was performed according to scientifically accepted techniques and outlined in the procedure manual.

Dr. Deadman's testimony regarding conformity with the third element of the *Polk* test was accepted by the trial court, a decision that we conclude was well-supported by the evidence.

Ware also argues that Dr. Deadman should not have been allowed to testify since he did not personally perform all the tests about which he testified. However, the work was performed under his supervision. Ware relies on a case that prevented a records custodian from testifying as to the results of the State Crime Lab's analysis of a substance, finding such testimony to violate the Sixth Amendment right to confrontation. ***Kettle v. State,* 641 So. 2d 746, 749-50 (Miss. 1994).** The court specifically ruled that in a drug possession or sale case, the person who conducted the laboratory test was a necessary witness. ***Id.* at 750.** Here we do not have a records custodian, but instead the supervisor of the DNA analysis unit, in which several experts perform tests that together constitute the evidence that permits DNA in different samples to be compared. This witness supervised the examinations and was himself "responsible for reaching conclusions that are obtained from the comparisons that are conducted." He then prepared the report. This is not a records custodian, but a witness with a Ph.D. in chemistry who was actively involved in the over-all testing even if he did not perform each individual test. Unless every member of the lab team must show up in court, and we hold that is not necessary, Dr. Deadman's presence fully satisfied Ware's confrontation rights.

Ware's only other challenge to the testimony and related exhibits is that Dr. Deadman is a "voodoo expert" put on the witness stand by the State impermissibly to bolster their case. Nothing could be further from the evidence in the record. The testimony was admissible.

5. Footprint Testimony

Ware asserts that the trial court should have suppressed footprint testimony and related exhibits because of a discovery violation. Yet at trial and in his appellate brief Ware concedes that the procedures for dealing with discovery violations were properly followed. ***See* URCCC 9.04(I).**

Additionally, no objection appears in the record as to this evidence. Without support in the record, the issue is not properly preserved for appeal.

6. Autopsy Photographs

Ware alleges that there was a discovery violation in relation to the autopsy photographs. On the first day of trial, Ware moved for a continuance based on newly discovered autopsy photographs. On Saturday morning, two days before trial, it was discovered that there were some autopsy photographs taken of Lackett. The existence of these photographs was unknown to either party

because they had never been turned over by the pathologist. Upon finding these photographs, a pathologist, Dr. Emily Ward, was contacted to consult with the defense. Dr. Ward met with the defense at 1:00 p.m. on December 6, 1994. After hearing arguments from counsel, the trial court determined that a continuance would not be necessary.

Discovery violations are to be addressed by the trial court according to the dictates of **URCCC 9.04(I)**. It provides:

> If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

This rule vests great discretion in the trial judge in ruling on an objection based on a discovery violation. However, no discovery violation occurred here, as the State and Ware learned of the photographs almost simultaneously. The court took every step necessary to protect Ware from prejudice from the late discovery. Ware claims that during trial he objected to the photographs and testimony based on a discovery violation. The record does not support his contention. There were no further objections by Ware after his attorney's meeting with the court ordered pathologist. In fact, there is no record of any objection to the photographs. The objections to the testimony were to leading questions, speculation, and claims that the testimony was outside of the witness's expertise.

Ware was given a full and fair opportunity to rebut the evidence presented by the State. Thus there was no abuse of discretion in the trial judge's permitting the use of this evidence.

7. Out-of-Court Identification

The State called witnesses who testified that they had seen Ware in the vicinity of Lackett's house near the time of the crime. During the investigation, the witnesses viewed a photo lineup. Ware moved to suppress the identifications of these witnesses based on a "tainted identification." Ware claims on appeal that since his photo was the only one bearing the caption "Madison County Sheriff's Department" it was impermissibly suggestive. It should be noted that Ware failed to object to the photo lineup prior to trial, and during trial he objected based on the fact that a date appeared on Ware's photo, which was November 13, 1992.

We will address the issue of the date on the photograph used in the photo lineup. The appropriate analysis is found in ***Fleming v. State*, 604 So. 2d 280, 301 (Miss.1992).** *Fleming* notes that in ***Neil v. Biggers*, 409 U.S. 188 (1972),** the United States Supreme Court held that even if the pretrial identification procedure had been unnecessarily suggestive, the identification did not have to be excluded if upon consideration of the totality of the circumstances there was no substantial likelihood of misidentification. There are five factors to be used in analyzing the totality of circumstances. These factors include:

(1) The opportunity of the witness to view the criminal at the time of the crime;

(2) The witness's degree of attention;

(3) The accuracy of his prior description of the criminal;

(4) The level of certainty demonstrated at the confrontation; and

(5) The time between the crime and the confrontation.

***Fleming,* 604 So. 2d at 301.**

Applying the above factors to the witnesses in this case: (1) the witnesses viewed Ware within one-half mile from the victim's house; they were able to see him clearly and had their attention focused on him as they passed him on the road; (2) they testified that they looked directly at the person trying to flag them down; (3) they described the person trying to flag them down to the police within two days after the murder and the description matches Ware and clothing that he owns; Luckett stated that he knew the person he had seen was "one of the Ware boys"; (4) both witnesses positively identified Ware at the photographic lineup and in court at trial; and (5) the photographic lineup was presented to them within two days of the crime.

The above facts need only be considered when a pre-trial identification is impermissibly suggestive. In this case, Coach Luckett testified that the date was not a factor in his identification. The photos were all of black men. We have examined the photographs and do not find error in the court determining there was nothing that singled out Ware. The photographic lineup was not impermissibly suggestive, and there was no substantial likelihood of misidentification.

8. Aggravating Circumstances Instruction

During the sentencing phase, the State proposed a jury instruction containing the "heinous, atrocious and cruel" aggravator and another instruction with a definition of that phrase. Ware objected. The trial court allowed both instructions to be given the jury.

On appeal, Ware argues that the giving of these instructions was improper because they are at best a confusing version of instructions authorized in ***Conner v. State,* 632 So. 2d 1239, 1270 (Miss. 1993).** The State argues that even if the instructions are incorrect, it avails Ware nothing because the jury did not impose the death penalty. We agree. The aggravating circumstances set out in the instruction were for use in determining whether or not to impose the death penalty. Since Ware was not sentenced to death, the instruction is of no consequence.

Ware argues that even though he did not receive a death sentence, the aggravating circumstances instruction clouded the jury's deliberations. Giving Ware the benefit of that possibility, we will address the merits of the attack on the instruction. An instruction defined what was meant by "heinous, atrocious and cruel" in this way: "the defendant utilized a method of killing which either caused serious mutilation or that there was dismemberment of the body prior to death or that the defendant inflicted physical or mental torture before death or that a lingering or tortuous death was suffered . . . ." The instruction in *Conner* uses three sentences to achieve essentially the same thing

that was done here in one sentence. The supreme court in *Conner* looked to a U.S. Supreme Court case for guidance. ***Maynard v. Cartwright,* 486 U.S. 356, 363-65 (1988).** The *Maynard* Court explicitly stated that torture and serious physical abuse were acceptable aggravators. ***Id.*** That is precisely the instruction we have before us, using a few more words perhaps, but the effect is the same. Accordingly, we find no error.

THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL MURDER AND SENTENCE TO A TERM OF LIFE IMPRISONMENT WITHOUT ELIGIBILITY OF PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST MADISON COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.